

FEDERAL MAGISTRATES COURT OF AUSTRALIA

BADU v MINISTER FOR IMMIGRATION

[2005] FMCA 208

MIGRATION – Migration Review Tribunal – visa – Spouse Provisional 309 Subclass visa – application for review of a decision by the Migration Review Tribunal finding that a person was not entitled to the grant of a Partner (Provisional) (Class UF) visa or a Partner (Migrant)(Class BC) visa – review Applicant a permanent resident of Australia – visa Applicant a citizen of Ghana.

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), s.475A

Craig v South Australia (1995) 184 CLR 63

Applicant: PATRICIA BADU

Respondent: MINISTER FOR IMMIGRATION &
MULTICULTURAL & INDIGENOUS
AFFAIRS

File No: SYG 2271 of 2004

Delivered on: 18 February 2005

Delivered at: Sydney

Hearing date: 18 February 2005

Judgment of: Scarlett FM

REPRESENTATION

Applicant: Applicant appears on her own behalf

Counsel for the Respondent: Mr Bromwich

Solicitors for the Respondent: Blake Dawson Waldron

ORDERS

- (1) The application is dismissed.
- (2) The Applicant is to pay the Respondent's costs of the application in the sum of \$ 5,250.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 2271 of 2004

PATRICIA BADU

Applicant

And

**THE MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS**

Respondent

REASONS FOR JUDGMENT

1. The application before the Court today is an application to review a decision made by the Migration Review Tribunal on 4 June 2004. The Migration Review Tribunal made a decision affirming a decision made by a delegate of the Minister. The delegate of the Minister found that Mr Yaw Frimpong was not entitled to the grant of a partner provisional class UF visa or a partner migrant class VC visa.
2. The Applicant in these proceedings was the Applicant before the Migration Review Tribunal. She is married to the Applicant for the visa Mr Frimpong.
3. A brief history of the facts is that the Applicant who is an Australian citizen travelled to Ghana in 2001. She is originally from Ghana. She was born in Ghana on 2 February 1982. On 30 June 2001 the Applicant met Mr Frimpong whilst she was on a visit to Ghana. She says that on 5 July 2001 they commenced a relationship. They were married a short time later on 18 July 2001. The Applicant says that

whilst they were both in Ghana the parties lived together as husband and wife.

4. Shortly after the marriage the Applicant in these proceedings returned to Australia. Mr Frimpong remained living in Ghana. There is no evidence that the parties have lived together since the Applicant returned to Australia early in August 2001.
5. On 28 October 2002 Mr Frimpong lodged an application for a visa. He included his step-children in the application. He applied for a visa on the basis that he was married to the Applicant in these proceedings.
6. On 4 December 2002 the delegate of the Minister refused the application. The delegate was not satisfied that the relationship was genuine and continuing. A number of grounds were given including the lack of supporting evidence, Mr Frimpong's lack of knowledge about the Applicant's circumstances, Mr Frimpong's inability to read English combined with letters and cards apparently from the Applicant to him, a number of inconsistencies in evidence, the short time between the parties having met and being married and the short amount of time that they actually lived together.
7. The Applicant in these proceedings lodged an application for review of that decision by the Migration Review Tribunal. That application was received on 3 February 2003. The application was prepared by a migration consultant on behalf of the Applicant. The details of the address of the migration consultant were crossed out. The document said that the migration consultant was no longer representing the Applicant.
8. The Applicant's address was given as Flat 22-277 Park Road, Auburn. On 24 November 2003 the Migration Review Tribunal wrote to the Applicant at her Auburn address. The Tribunal had received a letter on 23 October 2003 from the migration consultants.
9. They advised the Tribunal that they were no longer acting for the Applicant. In the letter of 24 November 2003 the Migration Review Tribunal invited the Applicant to provide further information about her application and sought particularly information that would show whether the Applicant and her husband had a mutual commitment to a

shared life as husband and wife and whether the relationship between them was genuine and continuing. There is no evidence that any further information was provided.

10. On 18 March 2004 the Tribunal wrote to the Applicant at her address in Park Road, Auburn inviting her to a hearing at 12 noon on 17 May 2004. The Tribunal arranged for an interpreter. The Applicant did not attend the hearing. Nevertheless the Tribunal went ahead and considered the application.
11. On 17 May 2004 the Tribunal wrote to the Applicant at her address in Park Road, Auburn inviting her to attend the handing down of the decision on 4 June 2004. I understand that the Applicant did attend.
12. The Tribunal's decision was not favourable to the Applicant. The Tribunal noted that the Applicant did not appear and noted that the letter sent on 24 November 2003 asking the Applicant to provide evidence to support her claim was not replied to. At page 32 of the Court book on par 16 the Tribunal said:

The review applicant failed to attend the hearing and the Tribunal accordingly proceeded to decision. Staff of the Tribunal noted that the hearing notice was returned to the sender. There was no notification of change of address from the review applicant. Staff of the Tribunal attempted to contact the review applicant at the number provided with her contact details. The person who answered the phone advised that the review applicant had moved and had no details of a forwarding address. The onus is on the review applicant to advise the Tribunal of any change in their contact details.

13. The Tribunal commented on the limited evidence that was available to it. It was unfortunate that the departmental file had been destroyed.
14. The Tribunal did find that the Applicant for the visa, Mr Frimpong, was validly sponsored by an Australian citizen.
15. The Tribunal also found, however, that Mr Frimpong and the Applicant in these proceedings were not in a genuine and continuing relationship at the time of the application or at the time of decision. Reg 1.15A requires that both of those things must be met. The Applicant has sought a review of the decision by the Migration Review Tribunal.

16. In her application filed on 20 July 2004 the applicant complained that the Migration Review Tribunal had taken a decision in her absence. She said she did not receive any letter inviting her to the hearing. She said that she had given her current address to the Department of Immigration and she had given adequate evidence to the Department to prove that her relationship was genuine and on going. She complained that the Department had destroyed her file and that because the Migration Review Tribunal had no file on her case the tribunal had treated her unfairly.
17. The Applicant has filed written submissions to the Court. These submissions were prepared for her by a solicitor. The solicitor assisted the Applicant on a pro bono basis by writing the submission. He made it clear to her that he could not appear for her before the Court. I have also read the Respondent's outline of submissions. In the Applicant's written submissions she refers to the unfortunate fact that the Department had destroyed her file.
18. It appears to me that in paragraph 5 of the submissions on page 4 that a word has been left out. The sentence in paragraph 5 as it is written reads:
- The facts of this case clearly show that the applicant's application to the tribunal was anything other than a valid application*
19. Quite clearly the word "not" has been left out of that sentence because the MRT would not be bound to review a decision if there was no valid application. The submission on behalf of the applicant complains that the destruction of the departmental file meant that the tribunal could not make a decision in her favour and she was therefore denied fairness.
20. The submission also went on to complain that the tribunal misconstrued its role in causing it to decide a decision against the Applicant. If that is established then there would be a jurisdictional error. The submission refers me to the decision of the High Court of Australia in *Craig v South Australia* (1995) 184 CLR 63. The thrust of the submission on behalf of the Applicant is that the tribunal did not review her application even though it was validly made.

21. Of course Mr Bromwich of counsel who appears for the Respondent has pointed out to the Court that the task of the Migration Review Tribunal is to review the delegate's decision and help the application to decide. I note that the written submission does not refer to any claim that the Applicant had advised the Migration Review Tribunal of her change of address.
22. The Applicant told the Court that she had written to the department advising of her change of address. She did not have a copy of that letter that she could produce. Because of the importance of this claim I offered the Applicant the opportunity to give evidence in the witness box. I explained to the Applicant the significance of giving evidence or affirmation before a Court and the fact that she could expect to be cross-examined. The Applicant elected not to give evidence.
23. The situation, as I see it, is that I have no evidence before me which would support the Applicant's assertion that she wrote to the tribunal or to the department advising of the change of address. The Applicant submitted that her marriage to Mr Frimpong was valid and was a genuine and continuing relationship.
24. She conceded that they had not lived together since August 2001. She submitted that it was not possible for her to do so as she lives in Australia and Mr Frimpong is still in Ghana. The fact that the Applicant and Mr Frimpong do not live together and have not done so for several years is of itself a fatal flaw in her application.
25. The particular visa that is relevant is a subclass 309 visa and the criteria to be satisfied set out in reg 309.211, particularly subparagraph 2(a). The person who applies for the visa must be the spouse of an Australian citizen. Spouse is defined in reg 1.15A. Reg 1.15A of paragraph 1 says, and I quote:

For the purposes of these regulations a person is the spouse of another person if the two persons are, (a) in a married relationship as described in subregulation 1(a) or (b) in a de facto relationship as described in subregulation 2.

26. Sub-regulation 1A says, and I quote:

Persons are in a married relationship if, (a) they are married to each other under a marriage that is recognised as valid for the

purposes of the Act and, (b) the minister is satisfied that (1) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others and, (2) the relationship between them is genuine and continuing and, (3) they (a) live together or (b) do not live separately and apart on a permanent basis.

27. Reg 1.15A(3) sets out the matters to be looked at in determining whether people are in a relationship. It can be seen that living together and not living separately and apart is a necessary requirement for obtaining a visa. Whilst it is not a sole requirement it is a necessary requirement. If a man and woman do not live together or they are living separately and apart a visa of this type cannot be granted.
28. It appears clear that parties who have not cohabited since early August 2001 cannot be said to be living together. Whilst this aspect seems to have been marginally overlooked in the MRT decision, as Mr Bromwich of counsel has pointed out to me, it is relevant to any exercise of the Court's discretion to note that the circumstances in this case are such that a visa cannot be granted because of the fact that the parties do not live together.
29. The Applicant has asked that she should have an opportunity to attend a hearing by the Migration Review Tribunal. The trouble is that the tribunal has held a hearing and the Applicant did not attend and did not provide further information. She has said that she was not informed. There is no evidence before that shows that she advised a change of address.
30. Whilst it is regrettable that the departmental file was destroyed prior to the hearing the existence of the file would not have affected the outcome of proceedings. The Migration Review Tribunal was not satisfied on the evidence before it that it could do anything else except affirm the decision to refuse the visa.
31. In submissions on behalf of the Respondent Mr Bromwich points out that the application to review asserts that adequate evidence had been given to the department to prove the relationship was genuine and on going but the application does not address the absence of any further evidence to cover the period from the time of the delegate's decision of 4 December 2002 to the tribunal hearing on 17 May 2004 or the handing down of the decision on 4 June of that year.

32. In other words he submits there is no suggestion that the Applicant had any further information to provide in support of her application for review. It appears clear that the application for review could not, in the circumstances, have succeeded.
33. There is no evidence before me to show that the Migration Review Tribunal did anything other than what it was required to do in considering the application. It did consider the application for review on the basis of the material before it. It did write to the Applicant asking her to provide further evidence. There is no evidence that she provided any further evidence.
34. The tribunal did write to the applicant inviting her to attend the hearing. She did not attend because she said she had moved. The tribunal appears to have attempted to contact the Applicant at the only address that the tribunal had. There is no reviewable error. The application must be dismissed. I dismiss the application. I order a transcript of my reasons for this decision.
35. As far as costs are concerned, costs follow the event. This is a matter where I think it is appropriate to make an order for costs. I propose to make an order for costs in a fixed sum. The Applicant is to pay the Respondent's costs of this application which I fix in the sum of \$5250. The application will otherwise be removed from the list of cases waiting finalisation.

I certify that the preceding thirty-five (35) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: V Lee

Date: 2 March 2005